

Local No. 12, International Union of Operating Engineers, AFL-CIO and Cal Tram Rebuilders, Inc. Case 31-CC-1567

23 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 16 August 1982 Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in opposition.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions¹ of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ In concluding that Respondent has not, as alleged, violated Sec. 8(b)(4)(ii)(B) of the Act, Chairman Dotson and Member Hunter find it unnecessary to rely on the Administrative Law Judge's comments in fn. 7 of his Decision, or on his reference therein to *Teamsters Local No. 83 (Allied Concrete)*, 231 NLRB 1097 (1977).

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: This case was tried before me at Los Angeles, California, on June 22, 1982, pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 31 on September 24, 1981,¹ and which is based on a charge filed by Tulare-Kings Employers Consultants, Inc., on July 19. The complaint alleges that Local No. 12, International Union of Operating Engineers, AFL-CIO (herein called Respondent), has engaged in certain violations of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended (herein called the Act).

¹ All dates herein refer to 1981, unless otherwise indicated.

Issues

Whether or not Respondent in early August threatened Sukut Construction, Inc. (herein called Sukut), with a work stoppage having an object of forcing or requiring Sukut to cease doing business with Cal Tram Rebuilders, Inc. (herein called Cal Tram), a material man engaged in the supply of ready-mix concrete to a Sukut jobsite.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I made the following:

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS

Respondent admits that Cal Tram is a California corporation engaged in the ready-mix concrete business having a batch plant located in Palmdale. It further admits that during the past year, in the course and conduct of its business, Cal Tram has purchased and received goods and materials valued in excess of \$50,000 from suppliers outside California.

Respondent also admits that Sukut is a California corporation headquartered in Santa Ana engaged in the building and construction industry as a general contractor. It admits Sukut annually purchases and receives goods directly from sources outside California valued in excess of \$50,000.

Accordingly, Respondent admits, and I find, that both Cal Tram and Sukut are engaging in commerce and in businesses affecting commerce within the meaning of Section 2(2), (6), and (7).

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

At material times Sukut has been the general contractor obligated to build the Fairmont Reservoir pursuant to a contract with the Department of Water and Power for the City of Los Angeles. The reservoir is located approximately 17 miles west of Lancaster. Sukut is bound by a collective-bargaining agreement with Respondent covering heavy equipment operators as well as certain other employees. The project commenced in early June and by late July and early August Sukut employed approximately 30 operating engineers. Sukut's project manager/superintendent during the period in question was Richard R. Yackley.

Pursuant to its effort to construct the reservoir, Sukut arranged to purchase approximately 10,000 cubic yards of concrete from Cal Tram. As it happened Cal Tram was involved in a labor dispute with Teamsters Local

982.² In furtherance of this labor dispute the Teamsters were in the process of picketing Cal Tram's Palmdale batch plant.

On July 30, Cal Tram made a small preliminary pour at the Fairmont Reservoir site. Yackley testified that members of the Teamsters Union had followed the Cal Tram trucks to the reservoir and observed the pour from the gate. They did not then, or at anytime later, actually picket. However, for approximately 10 days thereafter the Teamsters stationed individuals near the site entrance, presumably to determine whether or not Cal Tram made any additional deliveries.

According to Yackley, sometime between July 30 and August 10 a business representative of Respondent, Jack Forrest, appeared at the site. Yackley was unable to be more specific about the date of their first conversation. It is almost certain that a second conversation occurred on August 10; therefore, the first conversation must have been before August 10. Forrest, however, testified that the first conversation occurred on August 10 and the second conversation occurred on either August 12 or 14. Both are in agreement that two conversations occurred and as will be seen resolution of the date discrepancy is not necessary.

In the first conversation, according to Yackley's direct testimony: "Mr. Forrest informed me that we were pouring concrete with a nonunion supplier. And due to the labor agreement we had signed, we could not utilize a nonunion supplier. We were in violation of our master agreement. . . . I recollect that Mr. Forrest also brought up that the batch plant at Cal Tram was being manned by nonunion help. . . . He told me that the batch man for the Cal Tram plant should be an Operating Engineer and it was not." On cross-examination, Yackley testified that Forrest "asked" if Sukut had made a pour with Cal Tram, rather than "informed" Yackley of that fact. Yackley admitted they had and had done it pursuant to the purchase order. He denied using the terminology "sub-contract" in reference to the work saying Cal Tram would normally be characterized as a supplier rather than a subcontractor. Later he conceded that while he tries to be professional and use the correct terminology, in all honesty, "sloppy" terminology might occasionally be used.

Forrest testified that he had learned from some of his members that Sukut had used Cal Tram to pour some concrete and spoke to Yackley "about the 10th or somewhere along there." He said he asked Yackley about Cal Tram and was told that Sukut had "subbed" the concrete to Cal Tram. Forrest says he replied, "Dick, if you sub that concrete or anything else on this job to anybody that don't have an appropriate labor agreement, then you are in violation of that agreement. And I ask that you correct it." He recalls Yackley saying he would.

Yackley then testified that sometime between the first and second conversations he had with Forrest, Teamsters business agent, Donald Dyas, "sometime during the

week prior to August 11," told him, "If Cal Tram hauled onto our project one cubic yard more of material, that the Teamsters would in fact post the picket signs and picket the gate."

Yackley also testified that sometime prior to the week beginning Monday, August 10, his superiors in Santa Ana told him to obtain a union concrete supplier. Following that directive, he arranged for another firm, Conrock, to substitute for Cal Tram.

According to Yackley, his second conversation with Forrest occurred on August 10, sometime between 2:30 and 3:30 p.m. He said, "[I]f the Teamsters set a picket line up across the main gate, that the operating engineers would honor the picketline and would not cross it." Forrest then asked Yackley for permission to go on the project and speak to a Local 12 member named Snyder. Yackley observed Forrest speaking to Snyder but as they were approximately 1,000 feet away could not hear them.

On cross-examination, Yackley said that Forrest told him that if Cal Tram "came on the pour" the Teamsters would post a picket line. He conceded he already knew it as Dyas had so informed him a few days earlier. He also conceded that the decision to find a new supplier had been made before the second conversation. Even so, he said, he did not tell Forrest that he had substituted Conrock for Cal Tram.

Forrest testified that his second conversation with Yackley occurred 2 or 3 days after the first conversation. He said he had been told by one of his members that some engineers were being laid off. His purpose on the second occasion was to investigate that report. During the investigation the second conversation involving the concrete supplier occurred. He remembered saying, "Dick, I'm out here to see if I understood you correctly the other day when I was here. You told me you would correct the violation." He remembers Yackley saying, "It's being taken care of." He testified that the only reference to any threatened Teamsters picket line was Yackley joking about "the 'Teamo' down at the gate," an apparent reference to the Teamsters observers. Forrest told Yackley that he had seen them as he had come in. He remembers Yackley asking if the Engineers supported the Teamsters. He replied, "That setup down there at the gate has been approved by the L.A. Building Trades and my people are aware of it. Sometimes my people support them; sometimes they don't. It's up to the individual." Having been reassured that the problem was being solved, Forrest told Yackley he had no further business and left.

Forrest agreed that on one of his visits to the reservoir he did speak to one of his members, possibly Synder, explaining that he always talks to his members when he is on one of their jobsites. He denied telling the member that if the Teamsters put up a picket line the Engineers were to honor it. He does say that the member asked him if the picket line had been approved by the "Building Trades Council" and he admits he told the member that it had been.

In addition, Forrest testified that both Respondent and the Teamsters Local in question were members of the

² The details of the Cal Tram-Teamsters dispute are unimportant. Suffice it to say that the facility which Cal Tram operated in Palmdale had recently been operated by another firm which had recognized the Teamsters. In the change of ownership/operation, recognition of the Teamsters had been withdrawn.

Los Angeles Building and Construction Trades Council and due to Respondent's membership he was aware that the Teamsters had sought and received approval from the Council to picket Cal Tram. It is not clear whether the approval given by the Council covered only Cal Tram's Palmdale batch plant or whether it also included construction sites. Forrest denied that any direct communication between the Teamsters and Respondent occurred and there is no evidence to contradict him.

IV. ANALYSIS AND CONCLUSIONS

In reviewing the record here I have been particularly alert to evidence of an unlawful threat as it may be implied from conduct or trade usage as well as for any express threat having as an object forcing or requiring Sukut to cease doing business with Cal Tram. One salient fact is clear: Yackley admits that Sukut's decision to replace Cal Tram occurred prior to his second conversation with Forrest and after a direct contact with him by Teamsters representative Dyas.

Plainly Forrest's first conversation with Yackley avoided any language which can be reasonably interpreted as overtly threatening, coercing, or restraining Sukut with an unlawful object. Yackley recalls Forrest referred to the subcontracting clause in the collective-bargaining agreement requiring the use of union subcontractors. Forrest then asserted that because of the clause Sukut could not use a nonunion supplier and by doing so was in violation of the contract. Yackley later added that he simply told Forrest he was unaware that Cal Tram was nonunion. Neither on direct nor on cross did he testify that Forrest said anything regarding what Respondent intended to do about that.

Accordingly, I am not persuaded that the General Counsel has proven anything unlawful about Forrest's first conversation with Yackley. When Forrest's version is added to the mix any suggestion that a threat should be inferred is totally negated. Forrest said he simply asked Yackley to avoid violating the contract and that Yackley said he would. Whether or not the contract would actually have been violated by Sukut's continued use of a nonunion concrete supplier is immaterial. Clearly the clause would not apply to a supplier such as Cal Tram for it deals only with subcontractors, but even assuming that it did there is no reason to assume that Respondent would enforce the agreement by unlawful conduct.³ Forrest made no threats of any kind during the first conversation and there is no reason to think that he would resort to threats or stoppages at a later stage. Such an assumption would simply be speculation. Clearly all Forrest did was to make an appeal to management, without using any form of threat, restraint, or coercion to make a managerial decision to change suppliers. Such an appeal is perfectly lawful. *NLRB v. Servette*, 377 U.S. 46 at 51 (1964).

³ Yackley's concession that he may have referred to Cal Tram as a "sub" (using Forrest's word) is perhaps significant. If he did, he misled Forrest regarding Cal Tram's status and Forrest's reference to the subcontracting clause was the natural result of Yackley's own error. Moreover, no issue under Sec. 8(b)(4)(A) or Sec. 8(e) is presented by this complaint.

Forrest's second conversation with Yackley, as I have previously observed, occurred both after Dyas spoke to Yackley and after Respondent decided to replace Cal Tram with Conrock. The strongest evidence given by Yackley was his testimony that Forrest told him that if Cal Tram made a pour the Teamsters would post a picket line and Respondent's members would honor it and not cross it. This is coupled with his testimony that Forrest then spoke to one of his members. The only evidence regarding the nature of the conversation was Forrest's statement that the employee asked whether the Building Trades Council had approved the Teamsters picket line and Forrest said it had been.⁴

On this record it appears that the Teamsters had a primary dispute with Cal Tram and was privileged to engage in ambulatory picketing of that employer.⁵ As the picketing never occurred and as the Teamsters would have had the right to follow Cal Tram's truck to Respondent's facility and engage in the primary picketing of those trucks, it would not have been unreasonable for Forrest to concern himself with the potential picketing of the site by a stranger union. Certainly the employees, as well as Yackley, were well aware that the Teamsters had stationed observers at the gate and the possibility of Teamsters picketing in the near future was readily discernible to everyone. Furthermore, the incidental effects which might occur from such an incident were also foreseeable, i.e., it is not unusual for employees of a neutral employer to, in some fashion, honor a primary picket line even if the appeal is not directed to them. Forrest's testimony that the employee asked him if the Teamsters line was sanctioned by the Building Trades Council is fully consistent with that scenario. His statement to the employee that the picket line was indeed sanctioned by the Building Trades Council is not evidence that he induced that employee to honor the picket line or that Respondent had joined with the Teamsters in order to convert the foreseen Teamsters picket line from a primary to a secondary object. Certainly Forrest was not a Teamsters agent.⁶

Thus, even crediting Yackley, Forrest's statement does not amount to anything other than an observation that if the Teamsters did post a picket line at the construction site's main gate some neutral employees might well choose not to work. Seen in that light, it is clear that Forrest was doing nothing but making the accurate observation that primary picket lines often have secondary, albeit, permissible effects. Such a statement might even

⁴ Evidence that a union official merely spoke to a neutral employee during the course of a labor dispute is not evidence of an unlawful object. Here it is not clear that Respondent had a labor dispute with anyone, including Cal Tram. It is true that Yackley quotes Forrest as saying Cal Tram's batch plant operator should be an operating engineer, but such a remark is vague as evidence that Respondent was having a dispute over it. It is even more vague if it is to be considered evidence that Forrest was adopting the Teamsters dispute with Cal Tram as his own.

⁵ *Teamsters Local 807 (Schultz Refrigerated Service)*, 87 NLRB 502 (1949); *Teamsters Local 379 (Catalano Bros.)*, 175 NLRB 459, 460-461 (1969).

⁶ *Teamsters Local 542 (Shaker Express Delivery Service)*, 191 NLRB 515 (1971), *enfd. per curiam* 460 F.2d 1067 (9th Cir. 1972).

be designed to minimize the effect of the dispute by giving Sukut the opportunity to set up reserve gates.⁷

Of course, by the time Forrest allegedly made the statement, Sukut had already replaced Cal Tram with Conrock. As Forrest's first conversation with Yackley, under either version, was not unlawful, that fact suggests that it was the Teamsters representative's statement which caused Sukut to change concrete suppliers, not anything said or done by Forrest. In that circumstance, Forrest's second conversation could have had nothing to do with that decision. Furthermore, Forrest's testimony regarding the second conversation is fully consistent with my above analysis of Yackley's version. When Yackley asked if Respondent were supporting the Teamsters, Forrest only replied, "That setup down there at the gate has been approved by the L. A. Building Trades and my people are aware of it. Sometimes my people support them; sometimes they don't. It's up to the individual." In the extant context such a statement is not a threat. It is only an expression of concern regarding the possible incidental effects of a primary picket line. See *Oil Workers Local 346 (Pure Oil Co.)*, 84 NLRB 315 at 317-318 (1949).

⁷ Such a separation was arranged in *Teamsters Local 83 (Allied Concrete)*, 231 NLRB 1097 (1977), rev'd. 607 F.2d 827 (9th Cir. 1979). In that case, despite a reserve gate, the ambulatory pickets followed the primary disputant's ready-mix truck onto the construction site and stationed themselves at the pour. The Board held the picketing lawful; the court disagreed, but only because the reserve gate, in its opinion, provided an adequate place to picket. In contrast, Sukut took no steps to separate the primary disputants from the neutrals and it seems likely that the Teamsters could have lawfully followed Cal Tram's trucks directly to the pour. *Schultz Refrigerated Service*, *supra*. While it is not clear that Forrest was actually warning Sukut to take protective steps, Yackley nonetheless had full opportunity to do so.

In conclusion, I find that the General Counsel has failed to adduce evidence competent to prove that Respondent has engaged in any conduct constituting a threat, restraint, or coercion within the meaning of Section 8(b)(4)(ii). It may be that Respondent did not want Sukut to be doing business with Cal Tram but there is no evidence that it engaged in any conduct proscribed by the Act to attain that result. Moreover, on the record before me, Sukut's decision to oust Cal Tram in favor of Conrock appears to be the result of Teamsters conduct, not Respondent's. Accordingly, the complaint should be dismissed.

Upon the foregoing findings of fact and upon the entire record in this case, I hereby make the following:

CONCLUSIONS OF LAW

1. Both Cal Tram and Sukut are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local No. 12, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove that Respondent violated Section 8(b)(4)(ii)(B) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER

The complaint is dismissed in its entirety.